WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RAQUEL VILLALOBOZ, *Applicant*

vs.

DCD ELECTRIC BY WALSH SHEA CORRIDOR CONSTRUCTORS; ESIS, *Defendants*

Adjudication Number: ADJ12221422
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL

Applicant seeks removal in response to the Order issued by a workers' compensation administrative law judge (WCJ) on March 15, 2023 taking the trial of this matter off calendar for further discovery.

Applicant asserts that the Order of the WCJ taking the case off calendar will cause applicant to suffer significant prejudice and irreparable harm because discovery is complete in this case, and thus the matter should proceed to trial in order to create a proper record of the evidence.

We did not receive an answer from defendant.

We received a Report and Recommendation (Report) from the WCJ recommending we deny the Petition.

We have considered the allegations of the Petition for Removal and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons stated below, we will grant the Petition for Removal, rescind the WCJ's Order taking the case off calendar, and return this matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

The statement of relevant facts, as asserted by applicant in her Petition, are as follows:

***

On March 29, 2019, Applicant sustained a specific injury to multiple orthopedic body parts and body systems, arising out of and in the course of her employment with DCD Electric, Inc. (hereinafter "Defendant").

On September 15, 2021, Applicant was evaluated by Panel Qualified Medical Evaluator (hereinafter "PQME") Dr. Ronald Perelman. Dr. Perelman conducted an interview with Applicant, reviewed over 1,500 pages of medical records, and physically examined the Applicant. Dr. Perelman opined that Applicant reached Maximum Medical Improvement and is 100% totally disabled.

On February 17, 2022, Applicant's vocational expert, Ms. Aida Worthington issued her vocational evaluation of Applicant. On March 8, 2022, Applicant served the report on Defendant.

On March 25, 2022, Applicant filed a Declaration of Readiness to Proceed (hereinafter "DOR") and the matter proceeded to a Mandatory Settlement Conference (hereinafter "MSC") on May 10, 2022. Applicant's Attorney requested the matter be set for Trial on all issues because Applicant had been without benefits for 10 months and Applicant had completed discovery sufficient to prove their position at Trial. Defendant's Attorney requested the matter go off calendar to allow for their vocational expert evaluation to proceed on July, 13, 2022. This was Applicant's first notice that a Defense vocational expert evaluation had been scheduled. Since Defendant agreed to issue PDAs and the vocational expert evaluation was pending, the matter was taken off calendar.

By May 24, 2022, Applicant still had not received the PDAs that Defendant had represented was mailed on May 10, 2022. Therefore, Applicant's Attorney filed a new DOR and e-mailed the same to Defendant's Attorney. Applicant's Attorney believes Defendant's Attorney received the DOR because a check for PDAs was issued the very next day, May 25, 2022. That check covered PDAs from July 2021 through May 2022. Defendant objected to the DOR on June 10, 2022.

On July 13, 2022, Applicant attended the appointment with Defendant's vocational expert, Mr. Nick Corso. The subsequent report is dated October 21, 2022.

On August 23, 2022, the parties appeared for the MSC prompted by Applicant's DOR. At that time, Defendant confirmed benefits were not issued on May 10, 2022, as had been agreed upon, and Defendant confirmed the report from Mr. Corso was still pending. Applicant's Attorney requested the matter be set for Trial and stipulated to allow Mr. Corso's report to be entered into evidence at Trial. Defendant requested the matter be taken off calendar to allow them to receive Mr. Corso's report and to allow Applicant to complete the ongoing treatment with her treating physicians. Applicant's request for Trial setting was granted.

On March 15, 2023, the parties appeared for Trial before WCJ Holmes. At the time, Mr. Corso's report had been received. Defendant requested an OTOC,

arguing that Trial was set at the MSC as a "punishment". Applicant's Attorney requested to proceed with Trial as discovery had been completed. However, WCJ Holmes issued an OTOC quoting parts of PQME Dr. Perelman's report and stating that based on the medical reporting in EAMS, there appears to be a need to complete discovery.

(Petition, p. 2-3.)

On March 15, 2023, the WCJ issued an order taking the case off calendar (OTOC) in order to allow further discovery as requested by the defendant. On April 3, 2023, applicant filed her petition for removal in response to the OTOC Order.

DISCUSSION

In our review of the Order taking the case off the trial calendar, under the Board Reason, the following comments of the WCJ are noted:

DEFENDANT OBJECTS TO TRIAL ASSERTING IT SHOULD NOT HAVE BEEN SET, AND WAS SET FOR TRIAL BY MSC JUDGE AS A "PUNISHMENT." THE UNDERSIGNED JUDGE REVIEWED THE 9/15/21 REPORT OF QME PEARLMAN, NOTING PG 9 WHICH INDICATES "IT IS ALMOST IMPOSSIBLE TO OBTAIN AN ACCURATE PHYSICAL EXAM." AS WELL AS PG 13 IN WHICH THE SAME DOCTOR INIDCATES "THERE IS NO WORK-UP." IN RESPONSE TO QUESTIONING ABOUT "THERE IS NO WORK- UP," AA INDICATED HE DOES NOT KNOW WHAT THAT MEANS. BASED ON THE MEDICAL REPORTING IN EAMS, THERE APPEARING TO BE A NEED TO COMPLETE DISCOVERY, THE MATTER IS TAKEN OFF CALENDAR TO COMPLETE DISCOVERY. AA OBJECTS TO OTOC, INDICATING THE COURT IS REQUIRED TO GO ON THE RECORD TO MAKE A RECORD, BEFORE ORDERING OTOC TO DEVELOP THE RECORD. MATTER IS TAKEN OFF CALENDAR.

(Order, 3/15/23.)

The Report of the WCJ further addresses the issue as to why he issued the order to take the matter off calendar in pertinent part, as follows:

***

This case involves a trial level decision to take a matter off calendar in order to allow a party the ability to complete discovery. In the Petition for Removal at issue, Applicant asserts "discovery is complete in this case and the matter should proceed

to trial." (Petition for Removal, page 4, lines 27 – 28). Applicant further asserts "The WCJ has a duty to prepare a proper record of the evidence." (Petition for Removal, page 4, line 28). In effect, what Applicant is arguing is that a trial Judge must commence trial, before addressing the due process issue related to whether a party's discovery related due process rights would be violated.

In the instant case, the parties submitted a Pre-Trial Conference Statement, further memorializing Defendant's objection to trial, which states Defendant objected "…to trial setting as discovery is still continuing." (EAMS DOC. ID 43327832). While discussing Defendant's objection to trial, and the related request for time to complete discovery, in part, the undersigned Judge was directed to the September 15, 2021 report of Dr. Ronald Perelman, MD. (EAMS DOC. ID 43139610).

More specifically, Defendant asserted the need to complete additional discovery in relation to several issues. One issue was in relation to Dr. Perleman's conclusion in the September 15, 2021 report, in which Dr. Perleman stated "[i]t is almost impossible to obtain an accurate physical examination." (EAMS DOC. ID 43139610, pg 9). Another basis for Defendant asserting the need for additional time to complete discovery was in relation to Dr. Pereleman's determination in the "Discussion/Causation" portion of the September 15, 2021. It is in this section that Dr. Perleman indicates "[t]here is no work-up" in relation to the Applicant. (EAMS DOC. ID 43139610, pg 13).

***

Having had the opportunity to engage in in depth discussion with the parties, as well as review the report in question, it is clear to the undersigned Judge that Defendant's repeated objections to commencing trial before discovery is complete were based on specific articulable facts. It is also clear that a denial of Defendant's repeated requests to complete discovery, especially in light of the recently obtained vocational expert report dated October 21, 2022 (EAMS DOC. ID 43993277), would result in a violation of Defendant's due process rights. Finally, the delay in commencing trial, while Defendant completes discovery, will not result in significant prejudice or irreparable harm to Applicant.

(Report, p. 2-4.)

Based upon the comments set forth in the WCJ's Order as well as the Report, it appears that the decision to take the matter off calendar for the defendant to obtain additional discovery was based, at least in part, upon the medical reporting of the PQME Ronald Perelman.

Applicant asserts in her petition that the WCJ has a duty to prepare a proper record of the evidence, and that the failure to do so deprives her of the right of review of the WCJ's findings by

the Board. In support thereof, applicant cites to our panel decision[1] in *Pini v. County of Fresno* (2010 Cal. Wrk. Comp. P.D. LEXIS 439) in which it was found that without a record, including exhibits, evidence, and testimony, a determination by the WCJ as to whether the record needed further development was premature. As we stated in *McDuffie v. Los Angeles Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (appeals board en banc):

> As set forth in *Tyler v. Workers' Comp. Appeals Bd. (1997) 56 Cal.App.4th 389 [65 Cal Rptr. 2d 431] [62 Cal.Comp.Cases 924, 926–927]*, *Labor Code sections 5701* and *5906* authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. (See also *Lundberg v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 436 [445 P.2d 300, 71 Cal. Rptr. 684] [33 Cal.Comp.Cases 656, 659]*; *King v. Workers' Comp. Appeals Bd. (1991) 231 Cal.App.3d 1640 [283 Cal. Rptr. 98] [56 Cal.Comp.Cases 408, 414]; Raymond Plastering v. Workmen's Comp. Appeals Bd. (King) (1967) 252 Cal.App.2d 748 [60 Cal. Rptr. 860] [32 Cal.Comp.Cases 287, 291].)* Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (*Tyler,* supra, 62 Cal.Comp.Cases at p. 928.)
>
> ***
>
> …where the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. Each side should be allowed the opportunity to obtain supplemental or additional reports and/or depositions with respect to the area or areas requiring further development, i.e., the deficiencies, inaccuracies or lack of completeness previously identified by the *WCJ and/or the Board. (Tyler, supra, 62 Cal. Comp.Cases at p. 928*.)
>
> (*McDuffie,* at p. 141-142.)

This contemplates the WCJ make a determination that the medical record requires further development *after* trial or submission of a case for decision on a disputed issue or issues. Without an adequate record, the parties are deprived of the right of an adequate review by the Appeals Board.

[1] While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (*Cortez*) (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (*Kleemann*) (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs. tit. 8, § 10955(a).)

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.)

Further, decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

Section 5313 requires that together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds

upon which the determination was made." (Lab. Code, § 5313; see *Blackledge v. Bank of America, ACE American Insurance Company* (*Blackledge*) (2010) 75 Cal.Comp.Cases 613, 621-22.) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) More significantly, a fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra,* at 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Here, while there appears to have been a review of a medical report of the PQME and a verbal discussion by the WCJ with the parties at the trial setting of March 15, 2023, there was no record of the proceedings created, which should have included the stipulations, issues, and exhibits of the parties.

Without a record, there is no meaningful opportunity to review the WCJ's decision to determine whether good cause exists for issuance of the Order taking the matter off calendar for further discovery.

Accordingly, we grant applicant's Petition for Removal, rescind the March 15, 2023 Order issued by the WCJ, and return this matter to the trial level for further proceedings consistent with this decision and for the WCJ to prepare a proper record of the proceedings in accordance with section 5313 and *Hamilton*.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Removal in response to the March 15, 2023 Order by the WCJ is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Removal of the Workers' Compensation Appeals Board that Order of March 15, 2023 is **RESCINDED** and this matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

RAQUEL VILLALOBOZ
HINDEN & BRESLAVSKY
HINSHAW & CULBERTSON

LAS/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*